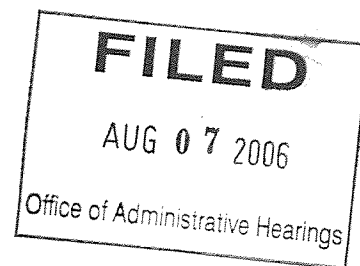


COMMONWEALTH OF KENTUCKY
ENVIRONMENTAL AND PUBLIC PROTECTION CABINET
FILE NO. BAH-32660-042
KENTUCKY BLASTER CERTIFICATION NO. 87-1322



ENVIRONMENTAL AND PUBLIC PROTECTION CABINET,

PLAINTIFF,

VS.

SECRETARY'S FINAL ORDER

DANA HAMILTON,

DEFENDANT.

* * * * *

THIS MATTER being before the Secretary upon the Report and Recommended Order of James L. Dickinson, Hearing Officer, and the Secretary having considered said Report and Recommendation, and any exceptions and responses filed thereto, and being sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. The Hearing Officer's Report and Recommended Order filed in the Record on October 5, 2005, is ADOPTED and incorporated by reference herein, as if set forth verbatim.

2. The Cabinet's Determination Letter of May 25, 2004 and the allegations set forth in the Cabinet's Administrative Complaint, dated June 17, 2004, are AFFIRMED and the Defendant, Dana Hamilton, (the "Defendant") is DEEMED TO HAVE VIOLATED the provisions of 405 KAR 7:070, Section 4 (1)(c) by having violated 405 KAR 16:120, Section 4(5) and (6) (use of explosives).

3. Defendant's Blaster Certification, Certificate No. 87-1332 IS SUSPENDED for a period of fifteen (15) calendar days, said suspension period to begin thirty (30) days from the date this Order is entered and mailed.

4. The Defendant SHALL SURRENDER, within thirty (30) days of the date this Order is entered and mailed, his Blaster Certification by delivering in person or mailing, postage paid, his Blaster Certification to:

Regional Director, Pikeville Regional Office
121 Mays Branch Road
Pikeville, KY 42501

5. The Defendant SHALL COMPLETE a Cabinet approved blaster retraining course within ninety (90) days of the date the suspension is scheduled to commence as set forth in Paragraph 3 of this Order. Upon completion of the blaster training class, the Defendant shall promptly furnish written documentation of a satisfactory completion of the blaster training course with such documentation being sent to:

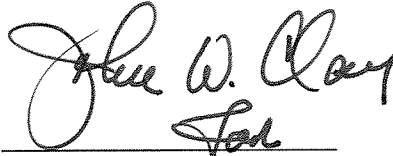
Acting Director, Division of Field Services
Department for Natural Resources, Hudson Hollow Complex
U.S. 127 South
Frankfort, KY 40601

Regional Director, Pikeville Regional Office
121 Mays Branch Road
Pikeville, KY 42501

6. If the Defendant fails to timely complete the blaster retraining course as set forth in Paragraph 5, the Defendant's Blaster Certification shall be SUSPENDED INDEFINITELY until such time the Defendant completes the retraining course and provides written documentation of satisfactory completion of the blaster retraining course.

7. This is a FINAL and APPEALABLE Order.

SO ORDERED this 7th day of August, 2006.

A handwritten signature in black ink, appearing to read "Lajuana S. Wilcher".

LAJUANA S. WILCHER
SECRETARY
ENVIRONMENTAL AND PUBLIC
PROTECTION CABINET
CAPITAL PLAZA TOWER, 5TH FLOOR
FRANKFORT, KY 40601

NOTICE OF APPEAL RIGHTS

In accordance with the provision of KRS 350.0305 and KRS 350.032, any person or party aggrieved by a Final Order of the Secretary resulting from a hearing may obtain judicial review of the Final Order by filing in Circuit Court a Petition for Review. Such Petition must be filed within thirty (30) days after the entry of the Final Order and a copy of the Petition must be served upon the Cabinet.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing SECRETARY'S ORDER was, on this 7th day of August, 2006, mailed by certified mail, return receipt requested, postage prepaid to:

DANA HAMILTON
P O BOX 3638
PIKEVILLE KY 41502

and mailed postage prepaid to:

HON BILLY SHELTON
JONES WALTERS TURNER & SHELTON
151 N EAGLE CREEK DRIVE STE 101
LEXINGTON KY 40509

and hand-delivered to:

Hon. JENNIFER CABLE SMOCK
Environmental and Public Protection Cabinet
Office of Legal Services
Fifth Floor, Capital Plaza Tower
Frankfort, KY 40601.



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COMMONWEALTH OF KENTUCKY
ENVIRONMENTAL AND PUBLIC PROTECTION CABINET
FILE NO. BAH-32660-042
KENTUCKY BLASTER CERTIFICATION NO. 87-1322

FILED

OCT 05 2005

Office of Administrative Hearings

ENVIRONMENTAL AND PUBLIC PROTECTION CABINET,

PLAINTIFF,

VS.

HEARING OFFICER'S REPORT
AND
RECOMMENDED SECRETARY'S ORDER

DANA HAMILTON,

DEFENDANT.

* * * * *

I. SUMMARY OF PROCEEDINGS, ISSUES, AND RECOMMENDATIONS

Nature of Case: Disciplinary / enforcement action filed by Environmental and Public Protection Cabinet in which the Cabinet is seeking a fifteen (15) day suspension of the Defendant's blaster certification because the Defendant violated 405 KAR 7:070, Section 4(1)(c) and 405 KAR 16:120, Section 4(5) and (6) by detonating a blast that caused rocks and debris to go off permit damaging a house belonging to Cecil Hatfield. The Cabinet is also requesting that the Defendant be ordered to attend a Cabinet approved blaster retraining class within ninety (90) days of the start date of the suspension.

Hearing Date: February 24, 2005

Appearances: Hon. Jennifer Cable Smock for Environmental and Public Protection Cabinet ("Cabinet"). Hon. Billy Shelton for the Defendant, Dana Hamilton ("Hamilton").

Submittal date: April 11, 2005.

Hearing Officer: Hon. James L. Dickinson.

Issues Summary: Whether the Cabinet properly issued a letter to Dana Hamilton alleging he had violated 405 KAR 7:070, Section 4(1)(c); whether the Cabinet properly evaluated the violation pursuant to 405 KAR 7:070 Section 4(2)(a)1, items a., b. and c.; whether the evidence presented at the Formal

Administrative Hearing justifies a recommendation of a fifteen (15) day suspension of the Defendant's blaster certification; and whether the evidence justifies a recommendation that the Defendant be ordered to attend a Cabinet approved blaster retraining course.

In addition to the factual issues set forth above, Hamilton raised the narrow issue of whether the underlying blasting violation is in fact a violation of 405 KAR 16:120, Section 4(5). As to this issue, Hamilton asserts that his actions did not result in "flyrock" being sprayed off the permit because the rocks that hit the Hatfield house came from the windrow and not from the blast site. As to this point, Hamilton maintains that unless the dislodged material is actually sprayed into the air or is material directly associated with the blast, there is no violation of 405 KAR 16:120, Section 4(5). Since he did not violate the Cabinet's regulations, the Cabinet cannot seek a suspension of his blaster's certificate.

Recommendations: The Hearing Officer recommends that under 405 KAR 7:070, Section 4(6)(c) the Secretary should issue an Order suspending Mr. Hamilton's Blaster Certification for a period of fifteen (15) days to commence thirty (30) days after the entry and mailing of the Order and to require Mr. Hamilton to attend a Cabinet approved blaster re-training course within ninety days of the commencement of the suspension period. In so recommending, the Hearing Officer concludes that the Cabinet correctly determined that Hamilton violated the provisions of 405 KAR 16:120, Section 4(5) in that material dislodged by the force of a blasting explosion constitutes "flyrock" as that term is used in the regulation. The Hearing Officer also concluded that Hamilton had violated 405 KAR 16:120, Section 4(6) in that he failed to prevent an adverse impact on property from his blasting operation. In addition, the Hearing Officer concludes that the Cabinet properly evaluated the incident in accordance with the factors set forth in 405 KAR 7:070, Section 4(2)(a)1, items a., b., and c. and that a suspension of fifteen (15) days is not an unreasonable period of time given the seriousness of the event and other relevant factors.

II. STATEMENT OF THE CASE \ EVIDENCE PRESENTED

As noted above, the allegations presented in the Cabinet's Administrative Complaint were heard at a Formal Administrative Hearing on February 24, 2005. At the hearing, the Cabinet called three witnesses: Charles Ooten, the Environmental Control Inspector who issued

the Notice of Noncompliance and Imminent Danger Cessation Order to Sunny Ridge Mining, Permittee and Appalachian Fuels, Operator; Greg Charles, an Environmental Control Inspector who assisted Mr. Ooten in his investigation; and Ralph King, the Cabinet's expert on blasting procedures. Counsel for Hamilton, called Dana Hamilton as his only witness.

The Cabinet introduced the following five (5) exhibits of which four (4) were admitted into the record. It should be noted, however, that Exhibit 2 consisted of 15 photographs. It should also be noted that Exhibit 3, which was a representation of the Mine Reclamation Map, was not admitted into the record and was not given any consideration by the Hearing Officer. A copy of this exhibit was not retained by the Hearing Officer.

- Exhibit No. 1 – Notice of Noncompliance and Order for Remedial Measures No. 53-0362 and Imminent Danger Cessation Order No. 53-0157.
- Exhibit No. 2 – Packet of 15 photographs labeled Exhibits 2A – 2O.
- Exhibit No. 3 – Representation of Mine Reclamation Map (**Not Admitted**)
- Exhibit No. 4 – Certified copy of a letter from Acting Director, Keith Smith to Dana Hamilton informing him that the Cabinet would seek a suspension of Hamilton's blaster certification.
- Exhibit No. 5 – Extracts from Permit No. 898-0473, Section 24 entitled Surface Blasting Plan.

Hamilton introduced and had admitted into the record the following three (3) exhibits..

- Exhibit No. 1 – Inspector's Violation Statement pertaining to 405 KAR 16:120
- Exhibit No. 2 - Inspector's Violation Statement pertaining to 405 KAR 7:040
- Exhibit No. 3 - Blasting log for May 7, 2004, compiled by Dana Hamilton

At the conclusion of the Formal Administrative Hearing, the Hearing Officer requested the parties to brief the question of whether the facts of this case constitute a violation of 405 KAR 16:120, Section 4 for purposes of determining whether Mr. Hamilton's Blaster Certification should be suspended. A scheduling order to this effect was entered on March 3, 2005, calling for the simultaneous submission of Memoranda and Response Memoranda. As

noted above, the record in this case was closed as of April 11, 2005, upon submission of the parties' Reply Memoranda.

III. FINDINGS OF FACT¹

Based upon a careful review of the record in its entirety, the Hearing Officer makes the following Findings of Fact for consideration by the Secretary.

1. The Cabinet is the executive agency of the Commonwealth authorized by the Kentucky Revised Statutes to enforce the provisions of KRS Chapter 350 and the regulations promulgated pursuant thereto (hereinafter "Kentucky Surface Mining Laws"). Under the Kentucky Surface Mining Laws and 405 KAR 7:070, the Cabinet has an obligation to test and certify individuals as Certified Blasters for purposes of being authorized to conduct blasting operations on Surface Disturbance Operations and Reclamation Permits issued by the Cabinet. 405 KAR 7:070 also has provisions pertaining to determinations of whether the Cabinet will seek to suspend or revoke such certifications and the factors to be utilized in making such determinations.

2. Permit No. 898-0473 is a Surface Disturbance Operations and Reclamation Permit issued to Sunny Ridge Mining, Inc. and is located in Pike County, Kentucky. Appalachian Fuels, LLC., is the authorized operator for the Permit. The Permit is a contour surface mining operation. As part of the permitted operations, Sunny Ridge Mining submitted a blasting plan which noted that blasting operations would occur within 500 feet of an occupied dwelling. One

¹ These Findings of Fact are limited to the facts which are material and necessary to the Conclusion of Law reached by Hearing Officer in Part III of this Report. They are not a summary of all the evidence presented at the Hearing. In instances where the evidence is in dispute, the Hearing Officer will make ultimate findings of fact as to which version of the alleged facts is proven with a preponderance of the evidence and the reason why a particular version of the facts or expert opinion is ultimately more credible.

of these dwellings belong to Cecil Hatfield whose home is approximately 500 feet down slope from the mining bench. The blasting plan also had provisions pertaining to flyrock control including powder factor, direction of movement, and proper bore hole pattern. Cabinet Exhibit No. 5. With respect to ground vibration, Sunny Ridge Mining stated that the maximum ground vibration limitation will be applied at the location of any dwelling, public building, school, church or institutional building outside the permitted area.

3. Dana Hamilton, a resident of Pike County, Kentucky, is a certified blaster, Kentucky Blaster Certification No. 87-1322. Hamilton has been a Cabinet certified blaster since 1987 and was in charge of all blasting operations associated with the surface mining operations being conducted by Sunny Ridge Mining and Appalachian Fuels on Permit No. 898-0473. Hamilton has also been in accordance with the provisions of KRS Chapter 351 a “licensed blaster” (License No. 8124) since 1981. As such, he is qualified to supervise all types of blasting operations.

4. The testimony presented at the Formal Administrative Hearing was uniformly consistent that Mr. Hamilton has a reputation of being a very competent blaster. In fact, Cabinet Inspector Greg Charles characterized Mr. Hamilton as being one of the top five blasters in Pike County and had never, until this investigation, had a complaint registered against him. In the context of this case, this is the first time the Cabinet has ever conducted a investigation concerning his fitness to be a certified blaster or whether his license should be suspended. Ralph King, the Cabinet’s blasting investigator, was also of the opinion that Mr. Hamilton was a competent and well qualified blaster.

5. On Friday, May, 7, 2004, Mr. Hamilton prepared a shot design / log for the breaking up of sandstone and shale material on the mining bench of the Sunny Ridge Permit. See Defendant's Exhibit No. 3. The blast log indicated that he prepared 98 production holes and a timed detonation sequence. The shot(s) was located in unconsolidated material and / or a muck pile. Hamilton designed the blast in such a way that blast should be directed towards the center and the material would fall into the center towards the bench and not fly out onto the out-slope. Prior to detonation, he stated he had surveyed the environs of the blast including the bench out-slopes and did not see anything he thought would be a problem. If he had seen any rock or debris of concern, he would have had them removed. He then secured the site by having the foreman block the road and sounding the warning siren. The blast detonated as planned. It was not a large explosion, and there was no spray of material.

6. On Tuesday morning, May 11, 2004, Cecil Hatfield called the Pikeville Regional Office with a complaint that his house had been damaged by rocks that had either been blasted from the mining bench or fallen down the hill from the permitted area. Since the complaint involved a possible blasting violation, Charles Ooten, the Inspector assigned to Sunny Ridge permit, requested that Greg Charles, the Regional Office blasting specialist, assist him in investigating the complaint.

7. Charles Ooten is a Environmental Control Inspector III and has been an employee of the Cabinet for over 15 years and has had extensive experience in conducting investigations of surface mining violations. However, he does not have any particular expertise with respect to blasting violations. Greg Charles, has been employed by the Cabinet for a number of years and his job duties at the Regional Office for the past two years have been principally devoted to

investigation blasting complaints. Greg Charles has received training from the federal Office of Surface Mining (“OSM”) and the Division of Field Services as to blasting practices and techniques and has also been trained with respect to analyzing seismograph data and other data associated with ground vibrations. However, Inspector Charles is not a certified blaster or a licensed blaster and has never designed or detonated an explosive shot.

8. On May 11, 2004, Inspectors Ooton and Charles conducted an investigation of the blasting complaint and inspected both the permitted area and Mr. Hatfield’s house. At Mr. Hatfield’s home, they found several medium size rocks and also observed that the back stoop / porch of the Hatfield’s home had been damaged. A rock had also struck and punctured the foundation of the dwelling See Exhibit 2-M. Although there were numerous rocks in the vicinity, they concluded that at least two rocks, depicted in Cabinet’s Exhibit 2-F and 2-N, came from the permitted area.² The Inspectors also concluded that a rock or rocks struck a road or driveway running alongside Mr. Hatfield’s house. See Exhibit 2-I.

9. As previously noted, the Inspectors also investigated the permitted area and interviewed Mr. Hamilton. Until the interview, Mr. Hamilton was unaware of the fact that Mr. Hatfield’s house had been impacted by rocks associated with the permitted area. During their investigation, they noticed that there was a large amount of unconsolidated material on the out-slope of the bench and there were rocks of varying dimensions in the windrow (a barrier consisting of logs and shrubs) located below the mining bench which would be readily visible to anyone who walked the out-slope area. See Cabinet’s Exhibit Nos. 2B-2D. In their opinion, if rocks like the ones they saw on May 11, 2004, had been in the windrow on May 7, 2005, they

² Mr. Hatfield apparently collected rocks for his rock garden and added to his “garden” one or two of the rocks associated with the violation.

should have been removed from the windrow before the commencement of blasting operations. The windrow was approximately 50 feet from the area where blasting operations were being conducted.³

10. At the Formal Administrative Hearing, Mr. Hamilton emphatically stated that the blast he detonated did not create a spray of flyrock and no material was ejected into the air. He was also of the opinion that the rocks that were observed in the windrow were placed there after the blasting operations as part of the cleanup operations and were not there when he detonated the blast. Hamilton also acknowledged that he was working as a certified blaster on two different permits.

11. Mr. Charles examined the blasting records and logs and did not notice anything unusual about the blasting plan. The preparation of blasting plan appeared to be appropriate for the type of detonation being contemplated.

12. Based on their inspection, and record review, they concluded that the blasting operations did not cause a spray of material to erupt from the permitted area. However, vibrations associated with the blast apparently caused some rocks in the windrow to dislodge and roll down the slope. Given the steepness of the slope, the rocks would have accelerated down the hill. Based on their visual inspections of Mr. Hatfield's property, the rocks were moving with enough force to actually penetrate the side of the foundation of the house and destroyed the bottom riser of the steps leading to the back stoop. They could not, and did not make a determination, that debris from the blast area itself was dislodged from the permit. In other

³ In its post-hearing brief, counsel for Hamilton inferred that the windrow area was "hundreds of feet away from the blast zone." See Defendant's Post-Hearing Memorandum at p. 3. However, Hamilton stated during his direct testimony that the windrow was about 50 feet away. The Hearing Officer finds that Hamilton's statement is more accurate.

words the material that escaped from the permit had not been thrown into the air and was not directly impacted by the blast itself. However, the vibration associated with the blast was strong enough to dislodge some rocks from the windrow. In addition to these observations, they also concluded that there was a fair amount of unconsolidated material on the out-slopes of the mining bench that presented a danger to the residences down slope from the mining bench. The Hearing Officer finds these conclusions to be credible and are accepted as part of these Findings of Fact.

13. On May 11, 2004, Charles Ooten issued to Sunny Ridge Mining and Appalachian Fuels Notice of Noncompliance and Order for Remedial Measures No. 53-0362 and cited the Permittee and Operator with a violation of 405 KAR 7:040, Section 3 (unsafe practices – company failed to notify Cabinet of flyrock incident), 405 KAR 7:040, Section 2 (off-permit material – rocks and other debris had gone off permit); 405 KAR 16:120 (failure to prevent damage to property) and 405 KAR 7:040 (unsafe blasting operations resulting in rocks coming down the hill and striking Mr. Hatfield's house).

14. Due to the unsafe blasting operations conditions and presence of unconsolidated material and rocks in the out-slope, Inspector Ooten also issued Imminent Danger Cessation Order No. 53-0157.

15. On or before June 2, 2004, the violations were abated. The remedial measures included among other things a wider safety (catch) bench below the mining bench. In addition

all debris had been cleaned up and pulled back to the mining bench.⁴

16. On June 2, 2004, Inspector Ooten prepared an Inspector's Violation Statement regarding this violation. In his report, he characterized Mr. Hamilton's conduct as being a failure to exercise reasonable care in that in his estimation, Mr. Hamilton exercised poor judgment and failed to take reasonable measures to keep debris from moving off the permitted area. See Defendant's Exhibits Nos. 1 and 2.

17. At the hearing, Inspector Charles was also of the opinion that Hamilton had failed to exercise reasonable care in making sure that the blast could be safely detonated. As the supervisor, Hamilton had an obligation to make sure materials on the permitted area would remain on the site and not be dislodged. Charles did not think that Hamilton had in any way acted willfully or knowingly. Charles characterized Hamilton's conduct as being a "little careless."

18. At some point shortly after the incident occurred, the record is not clear when, this matter was referred to Department for Natural Resources, Division of Field Services for a determination as to whether Mr. Hamilton should be sanctioned, pursuant to 405 KAR 7:070, for the violation resulting from the blasting incident occurring on May 7, 2004.

19. Ralph King was placed in charge of the investigation. Mr. King had previously been a surface mining inspector for the Cabinet since the mid-1980s and has been in charge of blasting investigations since 2002. Mr. King has received extensive training in blasting

⁴ On December 30, 2004, the Secretary signed and entered a so-called No Request Secretary's Order in which the permittee and operator waived their rights to an administrative hearing and did not contest the fact of violation underlying the Imminent Danger Cessation Order. The Secretary also imposed a civil penalty of Seven Thousand Seven Hundred Dollars (\$7,700) which was the penalty proposed in the Notice of Penalty Assessment issued on August 9, 2004. See Secretary's Final Order, File No. PAC-26856-V. The penalty has been paid by Appalachian Fuels.

investigations, was once a certified blaster, and is presently a certified instructor for the federal Office of Surface Mining in blasting. He has also assisted the Division of Mines and Minerals in preparing its courses for safe blasting practices.

20. During the previous two years, Mr. King has conducted 60 flyrock investigations, some of which resulted in an investigation, pursuant to 405 KAR 7:070, as to whether a certified blaster should have his certificate suspended or revoked. In at least five cases, he has recommended suspension of at least thirty days. In all five cases, flyrock had been cast off the permit or debris had been dislodged from the permit resulting in some degree of damage to property off permit. In other cases, however, he had concluded that a suspension was not warranted. With respect to so called “flyrock” violations, he stated that it has consistently been the Cabinet’s policy to determine whether the force of the explosion caused debris to be either cast into the air or be dislodged from the permitted area. As he understands the regulation and the way it has been applied, not all flyrock violations necessarily entail debris being pitched into the air. An explosion can cause material to roll off permit and as such is considered to be flyrock.

21. Under 405 KAR 7:070 Section 4(2)(a)1., with respect to recommending a revocation or suspension of a certified blaster, he had an obligation to determine the following:

- a. Whether well founded blasting procedures and reasonable precautions were used in endeavoring to prevent the violation;
- b. The seriousness of the violation;
- c. The history of the blaster’s performance; and
- d. The existence of any information suggesting that the blaster willfully committed or caused the violation.

22. As part of his investigation, he examined the permittee's blasting plan as set forth in Item 24 of the approved permit; he reviewed the blasting logs for this particular incident, and the Noncompliance and Cessation Order; and he interviewed the inspectors who investigate the incident.

23. Based on his investigation he concluded the following, which the Hearing Officer finds as being factual and credible:

A. As to the first item (item a) the regulation:

i The blast was apparently located in a muck pile or unconsolidated material and was located near the out-slope of the mining bench. Hatfield's home was about 500 feet down slope from the blast area. The location of the shot and its proximity to Mr. Hatfield's house should have called for a heightened sensitivity by the certified blaster in terms of blast confinement and vibration.

ii. The blasting log indicated to him a very confined shot; it should have been more open ended to minimize vibration and should have been placed further away from the out-slope. The confined nature of the shot cause the vibration to swell out resulting in the rocks in the windrow being disrupted and dislocated.

iii. A blaster is responsible for all aspects of the blasting plan, and he had a duty to inspect the area and make sure that loose material would not be dislodged or thrown off the permit by the force of the explosion.

iv. To a certain extent, given the duty of care that must be exercised by a blaster, negligence must be presumed in that the event speaks for itself. If there had been no negligence the event would not have happened.

v. The blasting plan had been properly prepared and there were no violations directly associated with the plan. However, as noted the plan probably had not been planned as carefully as it could have been given the location of the shot.⁵

B. As to the second item (item b.) in the regulation:

⁵ During the Formal Administrative Hearing, there was a fair amount of testimony devoted to the question of whether there was a safety or catch bench below the blast area and whether the blasting plan required a safety bench. The revised blasting plan which was submitted to the Division of Permits as part of the remedial measures for the Noncompliance expanded the size of the safety bench. Notwithstanding this testimony, it does not appear to the Hearing Officer that Mr. King considered the alleged absence of a safety bench to be a factor in deciding whether Mr. Hamilton's certificate should be suspended.

i. The violation was very serious in that debris and material actually struck the Hatfield home. There was a very real possibility that someone could have been seriously injured or killed from the incident.

ii. Rocks actually impacted the road which presented a very real danger to anyone who may have been driving in the vicinity.

C. As to the third item (item c.) in the regulation: There had been no previous violations cited against Mr. Hamilton. According to the inspectors, Mr. Hamilton was usually a very careful, conscientious blaster who took pride in his work.

D. As to the final item: There was no evidence suggesting that the violation had been willfully committed, and there was no evidence to suggest that Mr. Hamilton's certificate should be revoked.

24. Based on the foregoing and taking into consideration Mr. Hamilton's reputation as being a diligent and competent blaster, Mr. King concluded and recommended to Keith Smith, the Acting Director of the Division of Field Services, that Mr. Hamilton's certificate be suspended for a period of fifteen days (15) days and that Mr. Hamilton also be ordered to take a refresher training course. This was the most lenient suspension recommendation he had ever made. However, given the seriousness of the incident, in his opinion, suspension of Mr. Hamilton's certificate was warranted.

25. The Acting Director accepted his recommendation, and on May 25, 2004, he sent Mr. Hamilton a letter informing him pursuant to 405 KAR 7:070, Section 4 that the Cabinet would seek a suspension of his certificate. The Cabinet filed its Administrative Complaint on June 16, 2004 alleging it was entitled to the entry of a Secretary's Order suspending Hamilton's Blaster Certification for a period of fifteen (15) because, "a blast was detonated by the Defendant or under his direction...that resulted in debris being sent down the down slope and striking the Hatfield home."

IV. CONCLUSIONS OF LAW

26. Based upon the foregoing Findings of Fact, the Hearing Officer makes the following Conclusions of Law for consideration by the Secretary:

27. This case presents two questions for review. The first is whether the so-called “flyrock” incident set forth in the Findings of Fact is in fact a violation of the Cabinet’s Administrative Regulations, specifically 405 KAR 16:120, Section 4(5) and (6) and if so, whether Mr. Hamilton’s blasting certificate should be suspended for a period of at least 15 calendar days or whether some other sanction would be more appropriate. As to this question, the Hearing Officer will note that assuming the facts constitute a violation, the Defendant has no objection to being required to take a retraining course. Hamilton, however, strongly objects to the Cabinet’s request that his certificate be suspended.

A. Overview of 405 KAR 7:070, Section 4 and Burden of Proof.

28. Before addressing the questions set forth above and given the fact that this Office has had very few contested cases involving the suspension of a blaster certification, a brief review of the provisions of 405 KAR 7:070 is in order.

29. 405 KAR 7:070, Section 4 is a comprehensive regulation governing the procedure by which the conduct of certified blasters are evaluated. Based upon certain requisite findings, personnel of the Cabinet can elect to notify a certified blaster that it intends to seek a suspension or revocation of a blasting certificate. The regulation also provides that the Cabinet can elect to not seek a suspension or revocation but instead simply make a record of its investigation and include it in the blaster’s record for purposes of maintaining a history on the blaster.

30. Under 405 KAR 7:070, Section 4 (1), the Cabinet must first make a determination as to whether a certified blaster is in violation of the regulation. A certified blaster can be considered to be in violation if *inter alia* he, "...violates any provision of the federal explosive laws or Kentucky explosives laws or administrative regulations." 405 KAR 7:070, Section 4(1)(c). In this case, given the allegations set forth in the Notice of Noncompliance, the Cabinet concluded that Mr. Hamilton had violated 405 KAR 7:070, Section 4(1)(c) and consequently instigated an investigation pursuant to 405 KAR 7:070 Section 4(2)(a)1.

31. 405 KAR 7:070 Section 4(2)(a)1 requires the Cabinet to conduct an evaluation of the blaster's conduct with such an evaluation assessing the seriousness of the violation, the history of the blaster's performance, whether there was evidence that the violation was willful (in which case revocation is mandatory), and any other pertinent information.

32. Once this evaluation is completed, and if the Cabinet decides that it will in fact seek a suspension, the Cabinet is required to give the certified blaster notice that it intends to seek a suspension or revocation and provide him with notice of which regulation he has violated. 405 KAR 7:070 Section 4 (2)(b).⁶ Once the Notice has been served, the Cabinet must then file an Administrative Complaint pursuant to 405 KAR 7:092 Section 5. Thus, the burden of proof lies with the Cabinet to establish all of the elements of the violation. Once the hearing is concluded, the Hearing Officer is to prepare a report and recommended order for the Secretary's consideration. 405 KAR 7:070 4(6)(a) expressly provides that the Secretary may suspend or

⁶ Alternatively, the Cabinet can decide not to seek a suspension or revocation but instead after giving the blaster notice and opportunity to contest it determination, enter its finding of violation into the blaster's record as part of the Blaster's history. See 405 KAR 7:070 Section 4 (2)(c)2. This type of determination would in effect be a reprimand.

revoke a license and may also require additional training.

33. Finally, 405 KAR 7:070, Section 4(6)(c) provides as follows:

The term and conditions of each order rendered by the secretary pursuant to subsection (4)(b)3 or (5) of this section shall be commensurate with the pertinent factors surrounding the blaster and the violation(s). These factors may include, but not necessarily be limited to, the seriousness of the violation(s), the blaster's culpability for the violation(s), the history of the blaster's performance, and whether the blaster took reasonable care in determining that the operation would be in compliance with applicable laws and administrative regulations.

(Emphasis added)

34. In summary, this regulation sets out a procedure in which the Cabinet investigates a given blasting event and pursuant to that investigation gives notice to the certified blaster that it either intends to seek a sanction or not. Such recommendation must be made in accordance with the criteria set out in Subsection 4(2)(a)1. However, after reviewing the provisions of 405 KAR 7:070 Section 4(6), the Hearing Officer is of the opinion that he must use the criteria noted in that subsection when making a recommendation to the Secretary. And, as previously noted, the burden of proof and persuasion lies with the Cabinet. Thus, the Cabinet must establish by a preponderance of the evidence that a violation of 405 KAR 7:070 Section 4(1)(c) occurred and in accordance with 405 KAR 7:070 Section 4(6), the factors surrounding the blaster's conduct relating to the violation are such that a revocation, suspension or retraining, or a combination thereof, is warranted.

B. Analysis of 405 KAR 16:120, Section 4(5) and (6).

35. As can be seen from the Findings of Fact, the essential facts relating to the Inspectors' conclusions that rocks from the mine site were dislodged by the vibration of the explosion, rolled down the hill, and impacted Mr. Hatfields's house are not in dispute and do not need to be re-summarized here. However, counsel for the Defendant has filed in his Answer, and

subsequently in his post-hearing memorandum, what amounts to being a demurrer to the Cabinet's action. In his Memorandum, Hamilton argues that even if all the facts are accepted as being true, the facts themselves do not constitute a violation of 405 KAR 16:120, Section 4(5) because the result of the detonation set off by Mr. Hamilton was not a "standard run-of-the-mill flyrock violation." As to the event itself, he submits that a violation of the regulation can only occur if there was a spray of debris directly resulting from the detonation and being cast into the air, or at the very least that the material rolling off permit must come from the blast site itself. Since the material that was dislodged from the windrow was not "blasting material" as such, Hamilton argues that he cannot be found to be in violation of 405 KAR 16:120 Section 4(5).

36. In its post-hearing brief, the Cabinet argues that Hamilton violated 405 KAR 16:120, Section 4(5) and (6), because the force of the blast caused the material in the windrow to become dislodged. Since the resulting property damage can be directly attributable to the detonation, the Cabinet maintains that Hamilton violated 405 KAR 16:120, Section 4(5). In addition the Cabinet contends that Hamilton violated 405 KAR 16:120, Section 4(6) because Hamilton failed to conduct his blasting operation in such a way as to prevent any adverse impacts from occurring to private property.

37. 405 KAR 16:120, Section 4(5) and (6) provide as follows:

Section 4 (5) Flyrock. Flyrock, including blasted material traveling along the ground, shall not be cast from the blasting site more than half the distance to the nearest dwelling; public building; school; church; commercial, community, or institutional building; or any occupied structure and in no case beyond the boundary of the permit area or beyond the area of regulated access required under subsection (3) of this section.

Section 4 (6) Prevention of adverse impacts. Blasting shall be conducted to prevent injury to persons; damage to public and private properties outside the permit area; adverse impacts on any underground mine; changes in the courses,

channels, and availability of surface waters outside the permit area; and alterations of the ground water flow systems and ground water availability outside the permit area.

(Emphasis added.)

38. Since this Office has not previously considered an argument as to the definition of “flyrock” or “blasted materials,” this case appears to be one of first impression. The initial question to be resolved is whether 405 KAR 16:120, Section 4(5) can be reasonably interpreted to mean that blasted material, including non-blast material dislodged by the force of the blast, shall not be cast from the blasting site. In support of this argument, the Cabinet asserts that the term “flyrock”, which is otherwise undefined by the regulations, has been consistently interpreted by its personnel to include material coming from the blast site as well as material that might be affected by the force of the blast. Hamilton would have the Hearing Officer read this regulation more literally in that unless it can be shown that the material going off permit is either sprayed into the air or coming directly from the blast itself, then the material is not “flyrock” and a violation of 405 KAR 16:120 Section 4(5) cannot be cited. Instead, in his view, the only regulation that could be cited against the company (and presumably not the certified blaster) would be a violation of 405 KAR 7:040(2) (off permit disturbance). The distinction is crucial, because in Hamilton’s view unless the blaster can be cited with violating 405 KAR 16:120 Section 4(5), the Cabinet cannot conduct an investigation pursuant to 405 KAR 7:070.⁷

39. After carefully reviewing the arguments and recognizing that it has not been disputed that the Cabinet has for some time been interpreting flyrock to include material affected by the energy of the blast and does not necessarily include material coming directly from the

⁷ The Hearing Officer will reserve for another day whether 405 KAR 7:070 Section 4(1)(c) is applicable only to administrative regulations pertaining to blasting or whether it can be utilized against a blaster for any violation of an administrative regulation.

blast, the Hearing Office concludes that Hamilton's argument is so restrictive in its application that the regulation would become virtually unenforceable. See also 405 KAR 7:091 Section 3 (last sentence). Accepting Hamilton's argument would necessitate the Cabinet having to establish as an element of a blasting offense that the material found off-permit was actually part of the blasting material itself. This argument is inherently unreasonable and flies in the face of the Cabinet's more persuasive and long standing interpretation that flyrock material necessarily includes material that may be dislodged by the force or energy of the blast. The purpose of the regulation, of course, is to cite as a violation any injury or damage that may result from a "flyrock" incident. Thus, it is reasonable to conclude that the intent of the regulation was to include within the definition of "flyrock" material that may be dislodged as a result of a blasting incident, even though it may not come directly from the blast site.

40. However, notwithstanding the above analysis, there can be no question that Hamilton violated 405 KAR 16:120, Section 4(6) when he failed to conduct his operations in such a way as to prevent damage to property. Although counsel for Hamilton argues that Hamilton had inspected the windrow and that the shot was properly designed and executed, the fact remains that Mr. Hamilton's activities and his design of the blast resulted in an excessive amount of vibration, causing the material in the windrow to move down slope and damaging an occupied dwelling. Furthermore, given the mandatory language in 405 KAR 16:120, Section 4(6), the regulation is in essence a *per se* provision, meaning that negligence or *scienter* is not a requisite element for finding liability. Since there was in fact damage resulting from the blasting operations (either directly or indirectly), Mr. Hamilton must be found liable because he was the person in charge of the blasting operations.

C. Review of Cabinet's recommendations under 405 KAR 7:070 Section 4(6)(c)

41. Having concluded that the Cabinet properly found that Hamilton to be in violation of 405 KAR 7:070 Section 4, there now remains the question of whether the Cabinet's request that his certificate be suspended for fifteen (15) days and that he be ordered to take a retraining course is appropriate. As to the Cabinet's recommendation and in consideration of the factors listed in 405 KAR 7:070 Section 4(6)(c), the issue boils down to the blaster's excellent, and until now, impeccable history versus the other factors listed in 405 KAR 7:070 Section 4(6)(c), namely, his culpability, the seriousness of violation and the amount of care he took in determining that the operation would be in compliance with the Cabinet's regulations.

42. The Hearing Officer has carefully considered the evidence and is mindful of the fact that the Cabinet Inspectors spoke highly of Mr. Hamilton's abilities as a blaster. The Hearing Officer has also examined carefully the question of whether some other sanction would be a more appropriate penalty, and the Hearing Officer has taken into account the arguments offered by counsel for Hamilton that the amount of property damage was minimal.

43. Turning first to the question of culpability, the Hearing Officer must point out that by virtue of his blaster certificate Hamilton is in effect the captain of the mining operations when it comes to the performance of the blasting operations. He has (or should have) absolute and total control over the blasting design and plans. It must be this way, because blasting is an inherently dangerous operation, which can result in injury to people or damage to property if not done properly. Accordingly, Hamilton must exercise at all time in the performance of his duties a high degree of care. Thus, whenever he or someone under his control fails to carry out all of the

responsibilities associated with a blasting event, including inspection and removal of rocks from the environs of the blast area, the ultimate responsibility for the dislodging of those rocks is his.⁸

44. In assessing Hamilton's culpability, the Hearing Officer concludes that Inspector Ooten accurately characterized Hamilton's state of mind as being a failure to exercise reasonable care. Inspector Charles also acknowledge that although he thought Hamilton was an excellent blaster, he must have gotten a little careless. In any event, although not strictly analogous, the concept of *res ipsa loquitur* has some relevancy to this proceeding. If the blast had been properly designed and if the area had been properly inspected, there should not have been any damage to the property down slope from the mining bench. However, given the fact that damage did result (either directly or indirectly) from the force of the blast, the Hearing Officer must conclude that that Mr. Hamilton was negligent in either designing the blast or was negligent in not making sure that the rocks in the windrow were removed.

45. However, the degree of culpability was not reckless or willful. In the Hearing Officer's opinion, it appears that Hamilton for whatever reason failed to: (1) fully appreciate the potential hazard of the location of the site relative to Mr. Hamilton's house; (2) fully appreciate that the shot may be too confined; and (3) adequately assess the amount of resulting vibration by being satisfied that the shot would not spray rock. In other words, he knew the design of the shot was sound and would not spray rock. But he took a chance that the vibration of the blast would not dislodge some of the medium to small size rocks in the windrow, which in his professional

⁸ The Hearing Officer is also mindful of the realities of a surface coal mining operation where time is money and the certified blaster may be under pressure to set up a blasting plan quickly and efficiently. A company should never pressure a blaster to take short cuts; on the other hand a blaster has an obligation to tell other company employees to back off and allow him to do his job properly or he faces the very real possibility of being sanctioned if something goes wrong with the detonation.

opinion probably did not look that dangerous. Thus, the Hearing Officer concludes that Hamilton did not take reasonable care in, “determining that that operation would be in compliance with applicable laws and administrative regulations.” 405 KAR 7:070 Section 4(6)(c).

46. As for the seriousness of the violation, there is no denying the fact that the consequences of the blast were very serious. Although the resulting property damage may have been ultimately minimal, and not terribly traumatic to the Hatfields, the facts are undisputed that the debris was moving with such force that it actually penetrated the foundation of the dwelling and broke the rear stoop. If someone had been standing in the way of the rocks at the time of event, serious injury could have very well resulted. In the final analysis, the Hearing Officer agrees with the Cabinet’s assessment that this was a very serious and potentially life threatening violation and that Mr. Hamilton’s negligence caused the violation to occur. In the final analysis it is clear that Hamilton did not take reasonable care in making sure that the blasting operation would be in full and complete compliance with the Cabinet’s regulations.

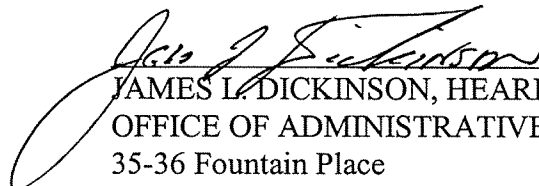
47. The Hearing Officer must now decide whether he should recommend to the Secretary the suspension period as requested by the Cabinet or some other sanction. The Cabinet supported its recommendation by pointing out, without any disagreement, that this sanction is the most lenient ever recommended and that this recommendation took into account Hamilton’s excellent reputation as a blaster. Given the factors listed for the Secretary’s consideration, the Cabinet’s recommendation is not unreasonable, nor is it arbitrary or capricious. Accordingly, the Hearing Officer agrees with the Cabinet’s assessment, taking into account all of the listed factors, that Mr. Hamilton’s certificate should be suspended for fifteen (15) days and that he should take

a Cabinet approved blaster training course within ninety (90) days of the entry and mailing of the Secretary's Order.

V. RECOMMENDATION

48. For the reasons set forth above, the Hearing Officer respectfully recommends that the Secretary sign the attached Order suspending Mr. Hamilton's certificate for a period of fifteen (15) days, commencing thirty (30) days from the date the Order is entered and mailed and ordering Mr. Hamilton to attend a Cabinet approved blaster training course within ninety (90) days of the commencement of the suspension period. Furthermore, in accordance with 405 KAR 7:070, Section 4(6)(d), Hamilton shall surrender his blaster certificate by either hand delivering or mailing his certificate to the Pikeville Regional Office.

So RECOMMENDED this the 5th day of October, 2005.


JAMES L. DICKINSON, HEARING OFFICER
OFFICE OF ADMINISTRATIVE HEARINGS
35-36 Fountain Place
Frankfort, Kentucky 40601
Telephone: (502) 564-7312

RIGHT TO FILE EXCEPTIONS

Pursuant to KRS 350.0301, any party may file Exceptions to this Report and Recommendation within fourteen days of service of this Report. Any party may submit a written response to the Exceptions within twenty-one (21) days of service of the Report and Recommended Order. Thereafter, the matter shall stand submitted to the Secretary, who shall consider the Report, any Exceptions and Responses, and the Recommended Order and decide the case

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing HEARING OFFICER'S REPORT AND RECOMMENDED SECRETARY'S ORDER was, on this 5th day of October, 2005, mailed by first-class mail, postage prepaid to:

HON BILLY SHELTON
JONES WALTERS TURNER & SHELTON
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and hand-delivered to:

Hon. JENNIFER CABLE SMOCK
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